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MAR 23 2010

Jim Ruby, Executive Secretary  
Environmental Quality Council

## Office of the Attorney General

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March 23, 2010

Mr. Loyd E. Smith  
Murane & Bostwick, LLC  
508 West 27<sup>th</sup> Street  
Cheyenne, Wyoming

RE: *In the Matter of a Notice of Violation Issued to WESCO – Docket Number 09-4601*  
– Findings of Fact, Conclusions of Law and Order

Dear Loyd,

Enclosed with this letter please find the Proposed Findings of Fact, Conclusions of Law and Order that I have filed with the Environmental Quality Council (EQC) in the above matter. Please note that you have until April 9, 2010, to file your objections to the enclosed document with the EQC.

Sincerely,

John S. Burbridge  
Senior Assistant Attorney General

cc w/enc: Don McKenzie – DEQ/LQD

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*Jim Ruby, Executive Secretary  
Environmental Quality Council*

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
OF THE STATE OF WYOMING**

**IN THE MATTER OF A NOTICE OF VIOLATION )  
ISSUED TO WESCO )  
P.O. Box 40, Wright, Wyoming 82732 )  
NOV No. 100559, Docket #4494-09 )**

**DOCKET NO. 09-4601**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This matter was brought before the Environmental Quality Council (EQC) on March 11, 2010, in Cheyenne, Wyoming at 1:30 p.m. Present for the EQC was the Presiding Officer Catherine Guschewsky; Councilmen F. David Searle, Tim Flitner, Dennis M. Boal, John N. Morris, Dr. Fred Ogden and Thomas Coverdale who participated by telephone. The Department of Environmental Quality (DEQ)/Land Quality Division (LQD) was present through legal counsel John S. Burbridge, Senior Assistant Attorney General. WESCO was present through its attorney, Loyd E. Smith. The Council has considered the record and arguments of the parties, and makes the following Findings of Fact, Conclusions of Law and Order:

**FINDINGS OF FACT**

1. The parties do not raise any issues of contested fact in this case. However the EQC finds the following facts in support of its decision in this case.
2. Between February 3 and February 12, 2009, WESCO became aware that one of its blasters allowed his certification to expire and notified the DEQ of the problem. (A.R. at 51 and 93). A DEQ inspector asked if WESCO's blaster conducted any blasts while his certification was expired and WESCO answered no. (A.R. at 51 and 93). The DEQ

inspector suggested that the WESCO employee attend a blasters class that was being offered in Sheridan, Wyoming, to allow the employee to become recertified. (A.R. at 95 and 100).

3. Instead of having its employee attend the class in Sheridan, WESCO sent a letter to the DEQ claiming that it had completed its own training from February 24 through 26, 2009, at its office in Wright, Wyoming. (A.R. at 101). As a result of this letter, the DEQ re-certified two of WESCO's employees as blasters in the State of Wyoming. (A.R. at 44 and 102).

4. During a blasters convention held on or about April 21 and 22, 2009, the DEQ inspector overheard that WESCO had "dummied up" a blaster training class. (A.R. at 51 and 104 -106).

5. The inspector conducted an investigation that included checking a coal mine guard shack log and interviewing several people that WESCO claimed had attended the class. (A.R. at 51 and 105-106).

6. The mine guard shack log revealed that individuals who were listed by WESCO as having attended the class were actually at the mine site on the days the class was represented as being held. (A.R. at 51 and 106).

7. During the interviews, the inspector was told that no class was held by WESCO during February of 2009. (A.R. at 51 and 106).

8. As a result of the investigation, the DEQ issued Notice of Violation (NOV) No. 100559 to WESCO for violating Land Quality Coal Rule and Regulation (LQCRR), Ch. 6, § 6(h)(i)(D) and assessed WESCO a penalty of \$120,000.00. (A.R. at 21 and 41).

9. From the time WESCO made its false representation to the DEQ on February 26, 2009, until late May 2009, WESCO remained silent as to its misrepresentation. (A.R. at 48, 53-4 and 118).

10. During that time WESCO benefitted by being able to continue its blasting operation using its illegally certified personnel. (A.R. at 139).

11. An informal conference between WESCO and the Director was held on July 13, 2009. (A.R. at 89). On August 18, 2009, the Director issued his Findings of Fact, Conclusions of Law and Decision reducing the penalty assessed against WESCO from \$120,000.00 to \$110,000.00. (A.R., at 50-54).

12. In determining the penalty assessment, the Director utilized the provisions of LQCRR, Ch. 16, § 3(a), and considered the following factors:

a. Factor (i) deals with the operator's history of compliance. As noted in the penalty assessment memo from Don McKenzie to me, dated May 20, 2009, WESCO has no prior history of violations. However, based on the fact that training never occurred, a penalty of \$10,000 was assessed. In keeping with the spirit of this factor and that the basis for this assessment is also addressed in factor (ii), I find that the penalty assessment should be reduced to zero.

b. Factor (ii) considers the seriousness of the violation based on the likelihood and extent of the potential or actual impact on the public or environment, both within and outside the permit or exploration area. I wish to stress that falsification of blasting training and records, and the potential for blasting to be undertaken by persons who have been purported to have been trained but have not, is very serious. It is typical of LQD to assess a \$10,000 per day penalty for every day that a violation occurs. Using only the days of training alleged by WESCO and the number of employees involved in those days, a penalty of \$90,000 was assessed. The \$90,000 penalty for this factor is upheld.

c. Factor (iii) addresses the degree of fault by the operator in causing or failing to correct the violation. I find that the degree of fault by WESCO is high. The penalty amount of \$10,000 is upheld.

d. Factor (iv) carried no credit for good faith actions on the part of the WESCO. I agree.

e. Factor (v) allows for credit or penalty if there is good reason to show that there is an inability for WESCO to comply. Not only was WESCO able to comply, they were also able on several occasions to notify LQD of the violation and present evidence of actions taken to prevent recurrence. They did not do this. The \$10,000 penalty for this factor is upheld.

f. Factor (vi) allows for penalty adjustment for any information provided by the operator within 15 days of Notice of order relating to the facts surrounding the violation or the amount of penalty. No information was submitted and no adjustment is made under this factor. The adjusted penalty is \$110,000. In concluding the reasonableness of this amount, it has been determined that there were 20 blasts made from January of 2009 until the NOV was written on May 20, 2009. The adjusted penalty relates to \$5,500.00 per occurrence. Since the LQD is authorized to calculate penalties up to \$10,000.00 per day of occurrence of a violation, this amount is reasonable.

(A.R. at 54-4).

13. WESCO timely filed its Notice of Appeal with the EQC on September 8, 2009, claiming that the penalty imposed by the DEQ was contrary to Wyoming law and the DEQ/LQD's rules and regulations. WESCO contested the assessment of the penalty amount, claiming that the misrepresentation was a one-time offense. (Br. of Pet. at 7). In accord with this contention, WESCO requested that the EQC reduce the penalty assessed by the DEQ to \$10,000.00. (*Id.* at 9).

14. In contrast, the DEQ asserted that the offense continued each and every day during which WESCO benefitted from its falsification that the blaster training class occurred.

(Br. of Resp't. at 2). The DEQ requested that the Director's Findings of Fact, Conclusions of Law and Decision be affirmed in all respects. (*Id.* at 14).

15. To the extent that any of the foregoing Findings of Fact constitute Conclusions of Law, they are incorporated as such in this order.

### CONCLUSIONS OF LAW

1. The EQC has jurisdiction over the subject matter and the parties to this proceeding pursuant to WYO. STAT. ANN. §§ 35-11-112(a), 35-11-112(a)(iii), and 35-11-112(c)(i) as follows:

2. "The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." WYO. STAT. ANN. § 35-11-112(a).

3. The council shall, "Conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof." WYO. STAT. ANN. § 35-11-112(a)(iii).

4. "Subject to any applicable state or federal law, and subject to the right to appeal, the council may: (i) Approve, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any division administrator." WYO. STAT. ANN. § 35-11-112(c)(i).

5. The assessment of a penalty for WESCO's violation is authorized by WYO. STAT. ANN. § 35-11-902(b), which includes additional penalties in the amount of \$10,000.00 for each day the violation continues until corrected by WESCO. That provision provides:

Any person who violates, or any director, officer or agent of a corporate permittee who willfully and knowingly authorizes, orders or carries out the violation of any provision of article 4 of this act for surface coal mining operations, or any rule, regulation, standard, license, variance or permit issued thereunder, or who violates any determination or order of the council pursuant to article 4 of this act for surface coal mining operations is subject to either a penalty not to exceed ten thousand dollars (\$10,000.00) for each day during which a violation continues, or, for multiple violations, a penalty not to exceed five thousand dollars (\$5,000.00) for each violation for each day during which a violation continues, a temporary or permanent injunction, or both a penalty and an injunction. Penalties and injunctive relief under this subsection may be recovered in a civil action.

WYO. STAT. ANN. § 35-11-902(b).

6. WESCO's violation was continuous under the provisions of WYO. STAT. ANN. § 35-11-902(b) because WESCO failed to take any action to correct its violation from the date it made its misrepresentation to the DEQ on February 26, 2009, until late May of 2009. (A.R. at 48 and 118).

7. By remaining silent, WESCO effectively reasserted its falsification every day after its submission of the letter to the DEQ claiming that it held a blaster training course when it had not.

8. LQCRR, Ch. 16, § 3(a) sets forth factors for consideration allowing the reduction of a penalty from a statutory maximum of \$10,000.00 for each day a violation continues until corrected under WYO. STAT. ANN. § 35-11-902(b), as follows:

In determining the amount of the penalty, if any, to be assessed, consideration shall be given to:

(i) The operator's history of previous violations at the particular surface coal mining operation, regardless of whether any led to a civil penalty assessment. Special consideration shall be given to violations contained in or leading to a cessation order. However, a violation shall not be considered if the notice or order containing the violation:

(A) Is or may become the subject of pending administrative or judicial review; or

(B) Has been vacated.

(ii) The seriousness of the violation based on the likelihood and extent of the potential or actual impact on the public or environment, both within and outside the permit or exploration area.

(iii) The degree of fault of the operator in causing or failing to correct the violation, either through act or omission. Such degree shall range from inadvertent action causing an event which was unavoidable by the exercise of reasonable care to reckless, knowing or intentional conduct.

(iv) The operator's demonstrated good faith, by considering whether he took extraordinary measures to abate the violation in the shortest possible time, or merely abated the violation within the time given for abatement. Consideration shall also be given to whether the operator gained any economic benefit as a result of a failure to comply.

(v) Inability to comply, unless caused by lack of diligence.

(vi) Any information submitted to the Director by the operator within 15 days of the service of the notice or order relating to the facts surrounding the violation or the amount of penalty.

9. The penalty of \$110,000.00 assessed by the DEQ as set forth in paragraph 12 of the above Findings of Fact against WESCO for its violation is appropriate, reasonable and supported by WYO. STAT. ANN. § 35-11-902(b) and LQCRR, Ch. 6, § 3(a).

**ORDER**

Pursuant to the authority vested in the EQC by WYO. STAT. ANN. § 35-11-112, it hereby **DENIES** WESCO's request to reduce the penalty assessed by the DEQ to \$10,000.00.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

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Catherine Guschewsky, Presiding Officer  
Environmental Quality Council  
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Cheyenne, Wyoming 82002